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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-543

BRIDGEPORT GUARDIANS, INC., *et al.*,

Petitioners,

vs.

MEMBERS OF THE BRIDGEPORT CIVIL SERVICE COMMISSION, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

Supreme Court of the United States

October Term, 1974

No.

Bridgeport Guardians, Inc., *et al.*,

Petitioners,

vs.

Members of the Bridgeport
Civil Service Commission, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners, Bridgeport Guardians, Inc., et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 3, 1974.

Opinions Below

The opinion of the Court of Appeals is reported at 497 F.2d 1113 and is reprinted in the Appendix hereto, pp. 14a-18a. The opinion of the District Court is not reported, but is reprinted in 8 EPD ¶ 9508 and is set out in the Appendix hereto, pp. 1a-13a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on June 3, 1974. On August 15, 1974, the Court of Appeals denied petitioners' petition for rehearing. Pp. 19a-20a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

Do the federal courts have the authority, in the absence of express statutory authorization, to award counsel fees to a successful plaintiff who acts as a private attorney general in enforcing important public policies?

Statutory and Constitutional Provisions Involved

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1981, 42 United States Code, provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons

and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licences, and exactions of every kind, and to no other.

Section 1983, 42 United States Code, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law suit in equity, or other proper proceeding for redress.

Statement of the Case

This action was commenced in February 1972, pursuant to 42 U.S.C. §§ 1981 and 1983, to challenge the constitutionality of certain hiring and promotion procedures of the Bridgeport, Connecticut, Police Department. Plaintiffs are several Black members of the Bridgeport Police Department, several Black and Puerto Rican applicants who had been rejected by the Department, and Bridgeport Guardians, Inc., an organization whose membership includes nearly all the Black policemen in Bridgeport. Plaintiffs contended, *inter alia*, that the written examination used in hiring policemen was not job related, and excluded disproportionate numbers of Black and Puerto Rican applicants.

After extensive discovery[1] and a trial lasting three weeks, the District Court concluded that the examina-

[1] The pre-trial discovery included six sets of interrogatories as well as extensive depositions. Petitioners also successfully defeated three motions to dismiss.

tion used in hiring patrolmen had "an unconstitutional effect because as used, it classified applicants by race and national origin without sufficient evidence of job relatedness to justify such a result." 354 F.Supp. 778, 793 (D. Conn. 1973). The District Court found that 58% of all white applicants passed the examination, compared to only 17% of the Black and Puerto Rican applicants. As a result of the examinations, of the 469 members of the Department, only 17 (3.6%) were Black and Puerto Rican, although those minorities accounted for 25% of the Bridgeport population. The proportion of minority policemen in Connecticut's two other large cities, Hartford and New Haven, was several times larger than in Bridgeport. The Bridgeport Police Superintendent conceded that test scores did not correlate with job performance. See 354 F.Supp. at 788-790. On appeal, the Second Circuit upheld the finding of discrimination, and the remedy for discriminatory hiring, and remanded for the refashioning of the remedy for discriminatory promotions. 482 F.2d 1333 (2d Cir. 1973).

This litigation brought about substantial changes in the hiring and promotion practices of the Bridgeport Police Department. The discriminatory examination was abolished and a non-discriminatory test established. General hiring procedures were reformed. Under the order of the District Court at least half of all vacancies in the rank of patrolmen were filled with qualified Black and Puerto Rican applicants until there were 50 minority patrolmen, an increase of 200%. Promotion and seniority rules were modified in various respects to dissipate the continuing effect of past discrimination.

On remand plaintiffs moved for an award of attorneys' fees for the 2 years of litigation in the District Court and Court of Appeals required to bring defendants into compliance with the law. The District Court, however,

concluded that it had no power to award such fees in the absence of "unreasonable, obdurate obstinacy." Pp. 11a-12a. The Court of Appeals affirmed on the same ground. Pp. 17a-18a.

Reasons for Granting the Writ

On four occasions in the last two years this Court has discussed, but found it unnecessary to decide, whether the federal courts have the power, in the absence of an express statutory authorization, to award counsel fees to a successful plaintiff who acts as a "private attorney general" in enforcing important public policies. In *Hall* v. *Cole*, 412 U.S. 1 (1973), this Court explained:

> . . . respondent contends that the award of attorneys' fees in this case might also be justified on the ground that, by successfully prosecuting this litigation, respondent acted as a 'private attorney general' vindicating a policy that Congress considered of the highest priority. Id., at 402. See also *Knight* v. *Auciello*, 453 F.2d 852 (1st Cir. 1972); *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971). In light of our conclusion with respect to the "common benefit" rationale, however, we have no occasion to consider that question.

412 U.S. at 7, n.8. The same question was presented in *Northcross* v. *Board of Education*,[2] 412 U.S. 427 (1973), and again not resolved.

> We also do not decide whether, and under what circumstances, an award of attorneys' fees is permissible in suits under 42 U.S.C. § 1983 in the absence of a specific statutory authorization for such an

[2] See Petition for Writ of Certiorari, No. 72-1164, pp. 7-8.

award. See *Knight* v. *Auciello*, 453 F.2d 852 (1st Cir. 1972); *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971).

412 U.S. at 429, n.2. In *Bradley* v. *School Board of City of Richmond*, 40 L.Ed.2d 476 (1974), the District Court had awarded counsel fees, *inter alia*, on the ground that plaintiffs had acted as private attorneys general[3] and this Court noted:

> It is particularly in the area of desegregation that this Court in *Newman* and in *Northcross* recognized that, by their suit, plaintiffs vindicated a national policy of high priority. Other courts have given explicit and implicit recognition to the priority placed on desegregation by the Congress. See *Knight* v. *Auciello*, 453 F.2d 852, 853 (1st Cir. 1972) and *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143, 145 (5th Cir. 1971) (housing); *Johnson* v. *Combs*, *supra*, 471 F.2d, at 86 (schools); *Miller* v. *Amusement Enterprises, Inc.*, 426 F.2d 534, 537-538 (5th Cir. 1970) (public accommodation); *Cooper* v. *Allen*, 467 F.2d 836, 841 (5th Cir. 1972) (employment). 40 L.Ed.2d at 493, n. 27.

In *Bradley* counsel fees were awarded on other grounds, and the Court again did not decide whether such fees could be awarded in the absence of express statutory authorization to a private attorney general. See 40 L.Ed.2d at 487-497. Two weeks after *Bradley* this Court again noted that the question of whether counsel fees could be awarded to private attorneys general still remained undecided. *F.D. Rich Co.* v. *Industrial Lumber Co.*, 40 L.Ed. 2d 703, 714 (1974).

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[3] See 53 F.R.D. 28, 41-42 (E.D. Va. 1971).

> The lower courts have also applied a rationale for fee shifting based on the premise that the expense of litigation may be a formidable if not insurmountable obstacle to the private litigation necessary to enforce important public policies. This "private attorney general" rationale has not been squarely before this Court and it is not so now; nor do we intend to imply any view either on the validity or scope of that doctrine.

The instant case requires a definitive resolution of that often deferred question.

In their motion for counsel fees, Petitioners expressly relied on the private attorney general theory, and stressed the effect of their efforts in vindicating important public policies.[4] The defendants, however, maintained that counsel fees could only be awarded if they had been guilty of unreasonably obstinate conduct in connection with the litigation.[5] The District Court acknowledged that plaintiffs had substantially advanced the public interest, but concluded it had no power to award counsel fees under the decisions of the Second Circuit.

> The Court of Appeals has recently stated the standard for awarding attorneys' fees in a § 1983 suit to be whether bringing the suit was unnecessary and was compelled by the defendant's "unreasonable, obdurate obstinacy". *Stolberg* v. *Trustees for the State*

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[4] Plaintiffs' Post-Trial Memorandum, pp. 41-45. Petitioners expressly relied, *inter alia*, on the decisions of the First and Fifth Circuits in *Knight* v. *Auciello*, 453 F.2d 853 (1st Cir. 1972) and *Lee* v. *Southern Home Sites Corp.*, 429 F.2d 290 (5th Cir. 1970). Id., p. 43.

[5] See, e.g., Brief for Appellants, pp. 14-16. "The standard for awarding attorneys' fees in a Sec. 1983 suit is whether bringing the suit was unnecessary, and was compelled by the defendant's 'unreasonable, obdurate obstinacy' ".

> *Colleges of Connecticut*, 474 F.2d 485, 490 (2d Cir. 1973). While *Stolberg* involved intentional denial of constitutional rights, it will not always be necessary to prove intentional discrimination to be entitled to attorneys' fees. But once the claim of discrimination has been made, there must be some indication that the defendant's decision to resist the claim imposed upon plaintiffs an unwarranted burden. That cannot be said in this case. . . .

P. 11a.

On appeal the Second Circuit reaffirmed the "unreasonable, obdurate obstinacy" test which it had announced in *Stolberg* v. *Trustees for the State Colleges of Connecticut*, 474 F.2d 485, 490 (2d Cir. 1973). The Court of Appeals stressed that section 1983, unlike Title VII of the 1964 Civil Rights Act,[6] or section 718 of the Emergency School Aid Act of 1972,[7] did not expressly authorize an award of counsel fees. P. 18a.[8]

This case raises the same conflict among the circuits presented by, but not resolved in, *Bradley* v. *Board of Education of City of Richmond*, 472 F.2d 318, 327-331[9] (4th

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[6] 42 U.S.C. §2000e-5(k).

[7] 20 U.S.C. § 1617.

[8] The Second Circuit characterized the decision of the District Court as a reasonable exercise of "discretion." Pp. 17a-18a. This is somewhat misleading, since the District Court concluded that the decisions of the Second Circuit precluded *any* award of counsel fees, as an exercise of discretion or otherwise, in the absence of obdurate obstinacy.

[9] "If, however, an award of attorney's fees is to be made as a means of implementing public policy, as the District Court indicates in its exposition of its alternative ground of award, it must normally find its warrant for such action in statutory authority. Congress, however, has made no provision for such award in school desegregation cases . . . . We find ourselves in agreement with

Cir. 1972), *rev'd on other grounds* 40 L.Ed.2d 476 (1974). The Second and Fourth Circuits have declined to adopt or apply the private attorney general rule. Courts of Appeals for the First, Third, Fifth, Sixth, Seventh, Eighth and Ninth Circuits, and the District of Columbia, have accepted that rule. Certiorari should be granted to resolve this conflict and establish a uniform rule for the federal courts. *Commissioner* v. *Bilder*, 369 U.S. 499, 501 (1962).

The first court to adopt the private attorney general rule in the absence of an express statutory authorization was the Fifth Circuit Court of Appeals. In *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971), a housing discrimination case under 42 U.S.C. § 1982, the district court, as here, concluded it had no authority to award counsel fees since the defendant had not been "unreasonable" or "obdurately obstinate". See 444 F.2d at 144. The Fifth Circuit reversed.

> We hold that attorney's fees are part of the effective remedy a court should fashion to carry out the congressional policy embodied in Section 1982. . . . The recent case of *Mills* v. *Electric Auto-Lite Co.*, 1970, 396 U.S. 375, . . . demonstrates that it is proper to award attorney's fees when this remedy effectuates congressional policy. . . . Section 1982 is not a statute providing detailed remedies, and thus the policy of effectuating congressional purpose does not militate against an award of attorney's fees. Additionally, here as in *Mills* there is strong congressional policy behind the rights declared in § 1982. Awarding attorney's fees to successful plaintiffs would facilitate the enforcement of that policy through private litigation.

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the conclusion that if such awards are to be made to promote the public policy expressed in legislative action, they should be authorized by Congress and not by the courts." 472 F.2d at 328-331.

444 F.2d at 145. Counsel fees were to be awarded to successful plaintiffs "unless special circumstances would render such an award unjust." 444 F.2d at 147. In *Cooper* v. *Allen*, 467 F.2d 836 (5th Cir. 1972), the Fifth Circuit applied the private attorney general rule to litigation under § 1981 to enjoin employment discrimination by local government agencies. See 467 F.2d at 841.[10] The Fifth Circuit applied the private attorney general rule to uphold an award of counsel fees in litigation under the Voting Rights Act of 1965 in *Fairley* v. *Patterson*, 493 F.2d 598, 606 (5th Cir. 1974). See also *Cornist* v. *Richland Parish School Board*, 495 F.2d 189, 192 (5th Cir. 1974) (§ 1983); *Callahan* v. *Wallace*, 466 F.2d 59 (5th Cir. 1972).

The private attorney general rule was adopted by the First Circuit 7 months after *Lee*. In *Knight* v. *Auciello*, 453 F.2d 853 (1st Cir. 1972), a § 1982 housing discrimination case, the district court had refused to award counsel fees. The First Circuit reversed.

> The violation of an important public policy may involve little by way of actual damages, so far as a single individual is concerned, or little in comparison with the cost of vindication as the case at bar illustrates. If a defendant may feel that the cost of litigation, and, particularly, that the financial circumstances of an injured party may mean that the chances of suit being brought, or continued in the face of opposition, will be small, there will be little brake upon deliberate wrongdoing. In such instances public policy may suggest an award of costs that will remove the burden from the shoulders of the plaintiff seeking to vindicate the public right. We regard this as such a case.

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[10] The substantive violation in *Cooper* was virtually identical to that shown in the instant case: the use of an examination which excluded disproportionate numbers of Blacks and bore no substantial relationship to job performance. See 467 F.2d at 838-840.

453 F.2d at 853. The First Circuit reaffirmed that position, and relied on it to award counsel fees against a federal agency, in *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency,* 484 F.2d 1331, 1333-34 (1st Cir. 1973).

In *Brandenburger* v. *Thompson,* 494 F.2d 885 (9th Cir. 1974), an action under § 1983 successfully challenging a state residence requirement for welfare, the District Court denied counsel fees on the ground, *inter alia,* that the defendants had not acted in bad faith. The Ninth Circuit reversed.

> Under the "private attorney general" doctrine an award of attorneys' fees should be made to a litigant who (1) furthers the interests of a significant class of persons by (2) effectuating a strong congressional policy. The award serves the purpose of encouraging such public-minded suits. . . . Under this doctrine, the good or bad faith of the defendant is irrelevant. *Sims* v. *Ames, supra,* 340 F. Supp. at 694-695.
>
> The instant case falls squarely within the ambit of the "private attorney general" doctrine. The plaintiff benefitted a significant class, persons who are both potential welfare recipients and interstate travelers by vindicating the federally protected right of interstate travel free from the forfeiture of welfare benefits. And, since § 1983 expresses a strong policy of vindicating federal constitutional rights against infringement by state officials, . . . the plaintiff furthered congressional policy by challenging the Hawaii statute.

494 F.2d at 888-89.

The question of counsel fees arose under circumstances virtually identical to the instant case in *Fowler* v. *Schwarz-*

walder, 498 F.2d 143 (8th Cir. 1974). There the plaintiffs, suing under §§ 1981 and 1983, successfully overturned the written examination employed in hiring firemen. See 351 F.Supp. 721 (D. Minn. 1972). The District Court, however, denied counsel fees, reasoning, as here,

> There is no statutory authority for such, and this is not the type of extraordinary case where the conduct of defendants was characterized by bad faith or unreasonable or obdurate obstinacy as to justify such an award.

498 F.2d at 144. The Eighth Circuit reversed on the ground that the district court had failed to use the correct guidelines in exercising its discretion.

> Two opinions of the Supreme Court in recent years have served as the impetus for the establishment of new guidelines for the award of attorney's fees to encourage litigation which vindicates certain strong Congressional policies. See *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968) . . . Moreover, the "private attorney general" doctrine of *Newman* has been applied to award attorney's fees under civil rights provisions of the United States Code without an express authorization of such fees.... Such reasoning is persuasive in our case as well. See *Cooper* v. *Allen, supra.* A suit under §§ 1981 and 1983 attacking racial discrimination in employment clearly furthers the will of Congress that such discrimination should be eliminated.

498 F.2d at 144-145. The private attorney general theory was also adopted by the Sixth Circuit in *Milburn* v. *Huecker*, 500 F.2d 1279 (6th Cir. 1974), *Taylor* v. *Perini*,

(No. 73-2071, 6th Cir.) (Opinion dated October 3, 1974), the Seventh Circuit in *Donahue* v. *Staunton*, 471 F.2d 475 (7th Cir. 1972) *cert. den.* 410 U.S. 955 (1973); *Morales* v. *Haines*, 486 F.2d 880, 882 (7th Cir. 1973), the Third Circuit in *Skehan* v. *Board of Trustees of Bloomsburg State College*, 501 F.2d 31, 44 (3d Cir. 1974) and the Court of Appeals for the District of Columbia in *Wilderness Society* v. *Morton*, 495 F.2d 1026, 1029-1037 (D.C.Cir. 1974), cert. granted 43 U.S.L.W. 3185 (1974).

In at least 24 cases federal district courts have awarded counsel fees under the private attorney general rule, without regard to the absence of "unreasonable, obdurate obstinacy." See e.g., *Harper* v. *Mayor and City Council of Baltimore*, 359 F.Supp. 1187, 1217-1218 (D. Md. 1973) (employment discrimination; 42 U.S.C. §§ 1981, 1983); *Stanford Daily* v. *Zurcher*, 366 F.Supp. 18, 21-26 (N.D. Cal. 1973) (unlawful search and seizure; 42 U.S.C. § 1983); *Ross* v. *Goshi*, 351 F.Supp. 949, 955-56 (D. Hawaii 1972) (free speech; 42 U.S.C. § 1983); *Jinks* v. *Mays*, 350 F. Supp. 1037, 1038 (N.D. Ga. 1972) (employment discrimination; 42 U.S.C. § 1983); *Holt* v. *Hutto*, 363 F.Supp. 194, 217 (E.D. Ark. 1973) (prison conditions; 42 U.S.C. § 1983); *Newman* v. *State of Alabama*, 349 F.Supp. 278, 286 (M.D. Ala. 1972) (hospital conditions; 42 U.S.C. § 1983); *Sims* v. *Amos*, 340 F.Supp. 691, 693-95 (M.D. Ala. 1972) (reapportionment; 42 U.S.C. § 1983) *aff'd* 409 U.S. 942 (1972); *N.A.A.C.P.* v. *Allen*, 340 F.Supp. 703, 707-710 (M.D. Ala. 1972) (employment discrimination; 42 U.S.C. § 1938); *La Raza Unida* v. *Volpe*, 57 F.R.D. 94, 98, 102 (N.D. Cal. 1972) (environmental protection); *Kirkland* v. *New York State Dept. of Correctional Services*, 374 F.Supp. 1361, 1381-82 (S.D.N.Y. 1974) (employment discrimination; 42 U.S.C. §§ 1981, 1983); *Incarcerated Men of Allen County* v. *Fair*, 376 F.Supp. 483, 485 (N.D. Ohio 1973) (prison conditions;

42 U.S.C. § 1983); *Thonen* v. *Jenkins*, 374 F.Supp. 134, 136-140 (E.D. N.C. 1974) (free speech; 42 U.S.C. § 1983); *Sierra Club* v. *Lynn*, 364 F.Supp. 834, 847-48 (W.D. Tex. 1973) (environmental protection); *Calnetics Corp.* v. *Volkswagen*, 353 F.Supp. 1219 (C.D. Cal. 1973) (Clayton Act; 15 U.S.C. § 18); *Wyatt* v. *Stickney*, 344 F.Supp. 387 (M.D. Ala. 1972) (conditions in mental hospitals); *Lyle* v. *Teresi*, 327 F.Supp. 683 (D. Minn. 1971) (police misconduct; 42 U.S.C. § 1983); *Morrow* v. *Crissler*, 4 EPD ¶ 7563 (S.D. Miss. 1971) (employment discrimination, 42 U.S.C. §§ 1981, 1983); *Ford* v. *White*, (S.D. Miss. No. 1230 (N)) (Opinion dated August 5, 1972); *Jordon* v. *Gilligan*, (N.D. Ohio) (opinion dated March 9, 1973), rev'd on other grounds 500 F.2d 701 (6th Cir. 1974); *Scott* v. *Opelika City Schools*, 63 F.R.D. 144, 149 (M.D. Ala. 1974) (employment discrimination; 42 U.S.C. § 1983); *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.*, 62 F.R.D. 353 (D. Del. 1974) (environmental protection); *Council of Organizations on Philadelphia Police, etc.* v. *Tate*, 60 F.R.D. 615, 616 (E D. Pa. 1973) (police misconduct; 42 U.S.C. § 1983); *Wallace* v. *House*, 377 F.Supp. 1192 (N.D. La. 1974) (voting discrimination; 42 U.S.C. §1983); *Gilpin* v. *Kansas State High School Activities Association*, 377 F.Supp. 1233, 1247-1253 (D. Kan. 1974) (sex discrimination; 42 U.S.C. § 1983). See also *Doherty* v. *Wilson*, 356 F.Supp. 35, 42 (M.D. Ga. 1973) (free speech; 42 U.S.C. § 1983); *Smith* v. *City of East Cleveland*, 363 F.Supp. 1131, 1151 (N.D. Ohio 1973) (employment discrimination; 42 U.S.C. § 1983); *Brown* v. *Ballas*, 331 F.Supp. 1033, 1037 (N.D. Tex. 1971) (housing discrimination; 42 U.S.C. § 1983); *Hammond* v. *Housing Authority*, 328 F.Supp. 586, 588 (D. Ore. 1971) (housing discrimination; 42 U.S.C. § 1983); *Stevens* v. *Dobs, Inc.*, 373 F.Supp. 618, 620 (E.D. N.C. 1974) (housing discrimination; 42 U.S.C. § 1982).

In the instant case both the District Court and the Court of Appeals stressed that the defendants had not been guilty of obdurately obstinate conduct. Pp. 11a, 17a. But the absence of such conduct is not sufficient to preclude an award of counsel fees under the private attorney general standard. *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968). Since an award of fees under this rule is intended to encourage litigation advancing the public interest, the good faith of the defendants is irrelevant. Many of the decisions awarding counsel fees to private attorneys general in actions under 42 U.S.C. §§ 1981-1983 have expressly stated that no obdurate obstinacy was found. See, e.g., *Brandenburger* v. *Thompson*, 494 F.2d 888 (9th Cir. 1974); *Stanford Daily* v. *Zurcher*, 366 F. *Supp.* 18, 25 (N.D. Cal. 1973); *Thonen* v. *Jenkins*, 374 F. Supp. 134, 137 (E.D. N.C. 1974); *LaRaza Unida* v. *Volpe*, 57 F.R.D. 94, 96 (N.D. Cal. 1972);[11] *Jinks* v. *Mays*, 350 F.Supp. 1037, 1038 (N.D. Ga. 1972);[12] *Ford* v. *White*, (S.D. Miss. No. 1230 (N)) (Opinion dated October 19, 1972).[13]

In denying counsel fees the District Court and Court of Appeals also argued that section 1983, unlike Title VII of the 1964 Civil Rights Act, does not expressly authorize an award of counsel fees. Pp. 11a, 18a. Title VII itself is inap-

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[11] "*LaRaza* involved complicated legal questions; by no means were the duties of the state clear, and the court reaffirms its earlier findings that the State Highway Department did not behave in Bad Faith . . . [D]efendants' errors and conduct falls short of obdurate behavior".

[12] "In its written opinion the Fifth Circuit pointed out that the record is devoid of evidence of any bad faith or unlawful motive on the part of defendants".

[13] "The plaintiffs did not base their claim for attorneys' fees on any bad faith or unreasonableness on the part of the defendants. From the outset, the defendants and their attorney worked closely with the attorneys for the plaintiffs as is evidenced by the final resolution of this case by a Consent Decree."

plicable because this case was filed prior to the 1972 amendments applying Title VII to state and local governments. A similar argument was made by the Fourth Circuit in *Bradley*, 472 F.2d at 328-331. But counsel fees have been awarded to private attorneys general under § 1983 by the Fifth Circuit, *Cornist* v. *Richland Parish School Board*, 495 F.2d 189, 192 (5th Cir. 1974) (school desegregation) the Ninth Circuit, *Brandenburger* v. *Thompson*, 494 F.2d 885, 888-89 (9th Cir. 1974), the Eighth Circuit, *Fowler* v. *Schwarzwalder*, 498 F.2d 143 (8th Cir. 1974) (employment discrimination), and the Seventh Circuit, *Donahue* v. *Staunton*, 471 F.2d 475, 483 (7th Cir. 1972). See also pp. 13a-14a, supra. In *Fowler* the Eighth Circuit reasoned that the provisions of Title VII militated for, not against, an award of counsel fees under § 1983.

The decision of the Second Circuit is clearly erroneous. When a violation of federally protected rights is shown, federal courts have the inherent "historic power of equity to provide complete relief in light of the statutory purposes." *Mitchell* v. *DeMario Jewelry*, 361 U.S. 788, 291-292 (1960). That power has traditionally included the authority to award counsel fees as part of costs where necessary "to do equity in a particular situation." *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 166-167 (1939). This Court has previously recognized the important role played by the availability of an award of attorneys' fees in cases such as this where private litigation is likely to be expensive to maintain to a successful conclusion and offer little promise of financial gain to the plaintiffs. *Hall* v. *Cole*, 412 U.S. 1, 13 (1973). As the Solicitor General correctly noted in supporting the private attorney general theory in *Bradley*, such private enforcement is a critical supplement to "otherwise limited government enforcement resources." [14] It is inherently unjust that, while thousands

of tax dollars may be expended to defend unlawful government action, the cost of securing compliance with the law should be borne by a private plaintiff or his counsel. Counsel fees have traditionally been awarded where this serves to shift the cost of the litigation to a group which has benefited therefrom, *Hall* v. *Cole*, 412 U.S. 1 (1973); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). The United States noted in *Bradley* that such fee shifting was appropriate in such a case because the litigation had "benefited the respondent school officials and the public at large by bringing about the elimination of unlawful, discriminatory practices from the schools [and] by vindicating their Fourteenth Amendment rights."[15] The same considerations apply to the instant case.

It is not disputed that Petitioners, by maintaining this action, did in fact vindicate public policies of the highest importance and confer substantial benefit on the community of Bridgeport. In awarding relief on the merits, the District Court conceded that the remedy not only advanced the interests of minority applicants and patrolmen, but vindicated the right of the citizens of Bridgeport "to the enforcement of law by a police department staffed on a non-discriminatory basis." 354 F.Supp. at 797. The Court of Appeals noted that fashioning an effective remedy was of particular importance because "the visibility of the Black patrolman in the community is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement." 482 F.2d 1333, 1341 (2d Cir. 1973). In denying counsel fees the District Court acknowledged the "substantial public service that

[14] Brief for the United States as Amicus Curiae, No. 72-1322, p. 9.

[15] Brief for the United States as Amicus Curiae, No. 72-1322, pp. 11-12.

plaintiffs' counsel have rendered in securing a vindication of their clients' constitutional rights, a result important not only to plaintiffs but to the entire Bridgeport community." This Court expressly recognized in *Bradley* v. *School Board of City of Richmond,* 40 L.Ed.2d 476 (1974), that ending racial discrimination is "a national policy of high priority." These circumstances require an award of counsel fees under the private attorney general theory and would have resulted in such an award in seven Circuits other than the Second.

The question presented by this case is related to, but not controlled by, the issues raised in *Alyeska Pipeline Service Co.* v. *The Wilderness Society,* No. 73-1977, cert. granted 43 U.S.L.W. 3185 (1974). The question raised by the Petitioners in *Alyeska* is not, as here, whether counsel fees may be awarded to private attorneys general in the absence of express statutory authorization, but whether such an award was proper on the unusual facts of that case and in view of the national policies regarding construction of the Alaska pipeline. If the award of counsel fees in *Alyeska* is reversed, as in *F.D. Rich Co.* v. *Industrial Lumber Co.,* 40 L.Ed 2d 703, 714 (1974), the correctness of the private attorney general rule will remain unresolved. If this Court affirms the award in *Alyeska,* that will not resolve whether, as the Second Circuit concluded below, counsel fees are precluded in cases such as this because of Title VII of the 1964 Civil Rights Act. In view, however, of the related nature of the issues presented, Petitioners would not object to the setting of an accelerated briefing schedule in the instant case so as to permit it to be argued with *Alyeska.*

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX

Memorandum of Decision of District Court

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CIVIL NO. B-457

BRIDGEPORT GUARDIANS, INC., ET AL.,

v.

MEMBERS OF THE BRIDGEPORT CIVIL SERVICE COMMISSION, ET AL.,

MEMORANDUM OF DECISION WITH RESPECT TO REMEDY

This case is before the Court for further action with respect to formulation and implementation of a remedy. By decision dated January 29, 1973, this Court ordered a remedy with respect to both the hiring and promotion of members of the Bridgeport Police Department. 354 F.Supp. 778. On June 28, 1973, the Court of Appeals for the Second Circuit affirmed that decision with respect to the hiring remedy but reversed with respect to the promotion remedy and remanded that aspect of the case for further proceedings. —— F.2d ——. The parties have been heard informally in chambers and in open court on September 11, 1973.

I.

With respect to hiring, the essential task is to implement those portions of this Court's original decree that

concern the appointment of patrolmen.[1] Defendants have submitted to the Court a detailed document prepared by the personnel director of the Civil Service Commission, which was marked in evidence as Deft. Ex. 2 at the September 11 hearing. (Exhibit A to this Memorandum of Decision). That document outlines a program for assembling the minority pool from which appointment of qualified minority patrolmen will be made. Plaintiffs made no objection to defendants' proposal, but offered eight additional suggestions (Pl. Ex. A), the first four of which defendants accepted. The Court agrees that the defendants' proposals, as supplemented by the first four of plaintiffs' suggestions, should be implemented. Since defendants have represented that they intend to implement these proposals and since some flexibility in developing the details of the proposals is desirable, it seems preferable at this point not to incorporate the proposals into a formal decree.[2] With jurisdiction of the case retained pending final implementation of the hiring remedy, plaintiffs can apply to this Court if the need should arise for

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[1] Plaintiffs urge that a substantive change should be made in the hiring remedy because of the Court of Appeals' rejection of a promotion quota. They contend that the quota of minority patrolmen, previously established at 15% until the number of minority patrolmen reaches fifty, should be increased to offset the reduction in minority officers that results from the elimination of the promotion quotas in order to maintain an overall department minority quota of 15%. Since the hiring portion of the original decree was affirmed, with no cross-appeal taken by plaintiffs in response to defendants' attack on the promotion quotas, it is doubtful if the level of the hiring quota remains an open question. Even if it is, I am not inclined to adjust the figure.

[2] Defendants still remain obligated, pursuant to paragraph 3 of the original decree, to submit to this Court for approval the details that are still to be developed as to the criteria and procedures to be used in determining the qualifications for the minority pool.

supplementary relief to insure that the defendants' proposals are being implemented. In the event the defendants require a further order of this Court to validate the proposed appointments as against conflicting state or local provisions, they can apply for an appropriate order. It may well be that the only formal order needed in this regard will be an order confirming the validity of the appointment of the successful applicants from the minority pool.

Defendants have also submitted (Deft. Ex. 1) a schedule for appointment of minority and non-minority patrolmen in accordance with the provisions of the original decree of January 29, 1973. That schedule is approved with one minor correction. Paragraph 2(a)(3) of the original decree specified that the quota provisions remain in effect until the number of Black and Puerto Rican *patrolmen* is 50. Deft. Ex. 1 misreads that provision to refer to 50 minority members on the police force. There is now one minority detective. Thus, after the 28 minority patrolmen have been appointed as contemplated in defendants' schedule, the remaining number to be appointed will be six, rather than five as stated in the exhibit. This figure will increase if some minority patrolmen become detectives or sergeants before the total number of minority patrolmen reaches 50.

All parties apparently expect the November 3 examination planned by defendants to produce a sufficiently large minority pool of qualified applicants to meet the requirements of the original decree. If that expectation is disappointed, defendants will have to submit additional proposals to this Court to implement the original decree.

Defendants have also raised an additional point with respect to paragraph 4 of the original decree. That pro-

vision maintained the validity of the existing eligibility list for patrolmen so that it could be used "in filling positions that became vacant within two years of the effective date" of such list. Since some of these positions will be filled from the minority pool, defendants want the existing patrolmen's list to be valid for use in filling any vacancies that would have been filled within two years from the effective date of this list without regard to this lawsuit. In other words, the list is to be valid until it has been used to fill the *number* of patrolmen's positions that become vacant during the two-year period starting with the effective date of the list. A similar problem with respect to the existing eligibility list for the rank of detective has an added complication because of the reduced time-in-grade requirement, and will be considered in Part II, *infra*.

II.

With respect to the remedy to be fashioned for promotion above the rank of patrolmen the parties make sharply conflicting claims. Plaintiffs urge that a quota or some other form of minority preference be part of the remedy. They recognize that the opinion of the Court of Appeals rejected the use of a quota with regard to promotion. They insist nevertheless that the Court of Appeals decision was made only with regard to the record as developed at the time of this Court's original decree, and that additional evidence will establish the propriety of a remedy that includes a quota. Specifically, they have made an offer of proof to establish two propositions: first, that significant recruitment of minority patrolmen will be seriously impeded as long as minority representation in supervisory ranks remains non-existent or minimal, and second, that the absence of minority officers in the ranks of the

Bridgeport Police Department has had and will continue to have an extremely adverse effect upon relationships between the department and the minority population of Bridgeport.

It was precisely considerations of this sort that led this Court to include a quota in its original decree. Additional evidence is not needed to persuade me of the validity of these propositions. But I do not read the opinion of the Court of Appeals as rejecting a promotional quota simply because the record as previously developed failed to indicate sufficient need for such remedy. Rather the Court of Appeals appears to have ruled as a matter of "law"—at least the law of equitable remedies—that in the absence of a finding that a promotion exam has produced discriminatory results that cannot be justified by a demonstration that the exam is job related, a promotional quota may not be used to remedy the absence of minority officers even though their absence is the ultimate result of a discriminatory hiring barrier at the level of patrolmen. The Court of Appeals has ruled that the concept of remedying the effects of past discrimination may not defeat the expectations for promotion of those Whites who are already members of the police department. One may wonder why this rule should apply with equal force not to applicants for promotion *above* the rank of sergeant, who have achieved their present officer rank through competition in exams not shown to be discriminatory, but also to applicants for promotion *to* the rank of sergeant, who have achieved their present rank of patrolmen only through competition in an exam found to be racially discriminatory. But the ruling of the Court of Appeals is clear, and I understand it to preclude the use of quota or other preference in any promotional ranks to remedy

the effects of past discrimination in the hiring of patrolmen, regardless of any evidence that might show how desirable such a quota might be.

The contention of defendants is that the Court of Appeals has precluded not only a quota or other preferential device with respect to promotions, but also any remedy selected with racial considerations in mind. I do not read the Court of Appeals' opinion to have gone so far. The opinion directs that "any feasible amendment [to the promotion procedures of the Bridgeport police department] apply to all candidates for promotion irrespective of race and ethnic background." It seems evident, however, that the Court of Appeals was not precluding, but was actually inviting consideration of changes that might increase the chances of minority members being promoted. For example, the Court of Appeals specifically suggested as a "possible solution" a reduction in the current three-year time-in-grade requirement for promotion eligibility. The obvious purpose of such a change is to make it possible for the new minority patrolmen to be considered for promotion earlier than they otherwise would be. The Court of Appeals was not proposing alternative remedies simply to hasten promotion in the interest of some preferred notion of public administration. The problem for which it was offering a possible solution is the absence of minority officers. Plainly the Court was permitting this problem to be borne in mind, provided only that the solution, once selected, applied to all candidates for promotion without regard to race or ethnic background.

With these considerations in mind, the details of a promotional remedy can now be considered. The defendants have suggested several changes in the existing promotion procedure: reduction of the time-in-grade

requirement to one year; replacement of the present rating for training, experience and general qualifications, which is based solely on time in the police department, with a new system basing the rating on the results of oral interviews before an examining panel;[3] replacement of the Probst system of rating service records with a new rating form to be developed by McCann Associates; validation of all promotion exams to be used in the future. These proposals are set forth in Deft. Ex. 2. In addition counsel suggested that a list of those eligible for promotion be prepared every two years so that vacancies can always be promptly filled as they occur. Plaintiffs do not oppose any of these suggestions. The Court agrees that these proposals should be implemented. As with the hiring remedy, it seems preferable not to incorporate these proposals into a formal decree. The defendants will be required to submit progress reports on November 15, 1973, and at three-month intervals thereafter until the hiring remedy has been fully implemented to advise the Court as to the progress being made with respect to both the hiring and promotion remedies.

The parties are in dispute with respect to (a) eight sergeants and three detective positions that were filled from existing lists in July, 1973, and (b) the filling of sergeant and detective vacancies that may arise hereafter. Plaintiffs want the 11 positions already filled to be declared vacant (with the incumbents continuing on an acting basis only), and these positions and all others in these ranks

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[3] This proposal is responsive to the Court of Appeals' suggestion that the weight accorded seniority be reduced. Since the old T.E.G.Q. factor was virtually a measure of seniority, this factor, weighted at 30%, when combined with the straight seniority factor, weighted at 10%, produced a 40% weight for seniority. The new proposal reduces seniority weight to 10%.

that may become vacant during the coming year to be held open for one year from the appointment of the new minority patrolmen. Defendants object to any change in the status of the 11 promotions already made and urge that existing lists be used for future appointments.

The circumstances surrounding the filling of the 11 positions do not reflect credit upon either the Bridgeport Police Department or the Bridgeport Civil Service Commission. The positions were filled before the mandate of the Court of Appeals reached this Court, a mandate that directed this Court to formulate a new promotion remedy. It is apparent that the defendants acted with unseemly haste to present this Court with a *fait accompli.* I do not intend to reward the defendants for their speed, nor do I intend to chastise the defendants at the expense of the men who received these promotions. Since I do not doubt my jurisdiction to alter the 11 promotions to acting status, I will deal with these 11 positions as if they were presently vacant and exercise equitable discretion without regard to the defendants' precipitous action.

The choice is between permitting promotions to be made in the normal course or requiring promotions on an acting basis only until such time as the new minority patrolmen (or a substantial number of them) are eligible to be considered for promotion under the new reduced time-in-grade requirement. I do not believe it is a sound exercise of discretion to require these eight sergeant positions to be held vacant for a prolonged length of time in addition to the time they were already held vacant pending the initial decision in this suit, nor do I think it advisable to formulate a remedy that risks displacing men who would be promoted to these positions on an acting basis to meet the legitimate needs of the police department. The competing

equity, of course, is the chance of hastening the promotion of minority sergeants. Since eight positions are involved, and the patrolmen ranks will include 15% minority members even if the hiring remedy is expeditiously implemented, only one minority patrolman could reasonably be expected to secure one of these sergeant promotions if the law of averages is working. The adverse consequences of the plaintiffs' proposal is not worth this benefit, which is only to advance by one year the time when a minority patrolman could be expected to secure promotion.

The relevant factors apply somewhat differently to sergeant and detective positions that become vacant one year after a significant number of minority patrolmen have been appointed. At that point, the reduced time-in-grade requirement that the defendants have agreed to implement will render the new minority patrolmen eligible for promotion to detective and sergeant. A remedy that insures their consideration for promotions occurring thereafter does not require the department to hold vacancies open nor does it risk displacing men promoted on an acting basis. Such a remedy would simply terminate somewhat early the validity of existing detective and sergeant lists in order to give effect to the new time-in-grade requirement. It is true that such a remedy may disappoint the expectations of those who stand high on the existing sergeant's list and who would have been promoted but for early termination of the list's validity. But these men[4] will not,

[4] At oral argument, counsel for the named intervening members of the police department questioned whether a decree could be formulated that altered any of the rights of those who stand high on current eligibility lists without such persons being formally joined as parties in this suit. Since the named intervenors include members of the department at all ranks, counsel for the named intervenors has vigorously asserted the interests of all

as with a quota or preference, be rejected because of their race. Rather they will simply have to enter a new competition among a field enlarged by both the required hiring of minority patrolmen and the reduced time-in-grade requirement. If the new time-in-grade requirement is to be promptly implemented, then this requirement of a new competition would befall any person high on the existing eligibility list regardless of race; moreover such persons will be entering a competition in which no racial preferences will exist. If they are better than the then current crop of eligibles, they will still be promoted; if they are not, it will not be because of any racial preferences.

III.

Plaintiffs seek to have attorneys' fees included in the costs to which they are entitled as the prevailing party in this litigation. There is no doubt that attorneys' fees can be awarded as a matter of discretion in the absence of statutory authorization. *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939). And where such discretion is reenforced by statute in the context of racial discrimination, that discretion is to be generously exercised. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). But this suit was not brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* It is an action under 42 U.S.C. § 1983 to redress the denial of rights secured by the Fourteenth Amendment. While the concept of private attorneys general is an important one, engrafting

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present members of the department, and the existence of this suit has been well known to all members of the department, it seems appropriate to treat this case as a class action with respect to the members of the police department and to consider the class as adequately represented by the named intervenors.

it on to § 1983 so as to make attorneys' fees "ordinarily" recoverable, *Newman* v. *Piggie Park Enterprises, Inc.*, *supra*, 390 U.S. at 402, would amount to a judicial amendment of § 1983 with a provision Congress has thus far not placed there.

The Court of Appeals has recently stated the standard for awarding attorneys' fees in a § 1983 suit to be whether bringing the suit was unnecessary and was compelled by the defendant's "unreasonable, obdurate obstinacy." *Stolberg* v. *Trustees for the State Colleges of Connecticut*, 474 F.2d 485, 490 (2d Cir. 1973). While *Stolberg* involved intentional denial of constitutional rights, it will not always be necessary to prove intentional discrimination to be entitled to attorneys' fees. But once the claim of discrimination has been made, there must be some indication that the defendant's decision to resist the claim imposed upon plaintiffs an unwarranted burden. That cannot be said in this case. Testing employment examinations against the Fourteenth Amendment is a developing area of the law, and at least as of the date when this suit was brought, the defendants' decision to resist plaintiffs' suit was not unreasonable or obstinate. No case in this District had dealt with the issues, and only one case in the Court of Appeals was in point. *Chance* v. *Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972). Moreover, this litigation required resolution of an issue left unanswered by *Chance*—namely, whether an examination that produced discriminatory results could be used where there was some rational relationship to a needed aptitude where but adequate evidence of job relatedness was lacking. On evidence similar to what was presented in this case, municipal employers in the future may be held to have resisted subsequent litigation unnecessarily. These defendants, however, were warranted

in litigating without assuming the risk of paying their adversaries' counsel fees. This does not diminish in any way the substantial public service that plaintiffs' counsel have rendered in securing a vindication of their clients' constitutional rights, a result important not only to plaintiffs but to the entire Bridgeport community. Hopefully, when the current frictions inevitably created by such litigation have eased, this suit will be recognized by all concerned to have been in the long-term best interests of the Bridgeport Police Department.

Accordingly, the decree previously entered on January 29, 1973, is modified as follows:

1. Paragraphs 2(b)-2(e) and all references to positions above the rank of patrolman in paragraph 2 are deleted.

2. Paragraph 4 is deleted and replaced with the following paragraph:

> 4. This Court's order of October 19, 1972, tolling as of March 6, 1972, the period of validity of existing eligibility lists for the rank of patrolman and detective, is modified to provide that the existing eligibility lists for the ranks of patrolman, detective, and sergeant are valid for use in filling the number of positions for each such rank that become vacant within two years of the effective dates of such lists, except that the existing eligibility lists for the ranks of detective and sergeant shall cease to be valid one year after the date on which the fifteenth patrolman has been appointed from the minority pool.

3. New paragraphs 5, 6, 7, and 8 are added as follows:

5. The defendants shall proceed to implement substantially in conformity with the documents submitted and representations made to the Court at the hearing on September 11, 1973, both the hiring and promotion proposals they have submitted to this Court and the proposals of the plaintiffs they have agreed to implement.

6. In the event that the examination scheduled for November 3, 1973, does not produce enough qualified minority applicants to bring the number of Black and Puerto Rican patrolman up to fifty, defendants will submit to this Court additional plans for the addition of qualified candidates to the minority pool.

7. The defendants will submit to the Court progress reports on November 15, 1973, and at three-month intervals thereafter until paragraph 2(a)(3) has been complied with, advising as to the progress made in the implementation of this decree.

8. Costs, not including attorneys' fees, are allowed to plaintiffs.

Dated at New Haven, Connecticut, this 3 day of October, 1973.

/s/ JON. O. NEWMAN
Jon O. Newman
United States District Judge

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 898, 899—September Term, 1973.

(Argued April 30, 1974 Decided June 3, 1974.)

Docket Nos. 73-2595, 74-1014

BRIDGEPORT GUARDIANS, INC., ET AL.,

Plaintiffs-Appellees, Cross-Appellants,

—against—

MEMBERS OF THE BRIDGEPORT CIVIL SERVICE COMMISSION, ET AL.,

Defendants-Appellants, Cross-Appellees.

Before:

WATERMAN, FRIENDLY and MULLIGAN,

Circuit Judges.

Appeal and cross-appeal from an order of the United States District Court for the District of Connecticut, Jon O. Newman, *Judge,* formulating and implementing remedy in employment discrimination action, and denying plaintiffs attorneys' fees.

Affirmed.

IRA HOROWITZ and MICHAEL P. KOSKOFF, Bridgeport, Connecticut, *for Plaintiffs-Appellees.*

J. DANIEL SAGARIN, Bridgeport, Connecticut and RICHARD SHEIMAN, Asst. City Attorney, Bridgeport, Connecticut, *for Defendants-Appellants.*

MULLIGAN, *Circuit Judge:*

The appeal and cross-appeal here involve litigation which was commenced on February 24, 1972, in the United States District Court for the District of Connecticut, by the Bridgeport Guardians, Inc., the Housing Police Benevolent Association and several Black and Puerto Rican individuals who had taken but failed merit system examinations for initial appointments and promotions within the Bridgeport Police Department. The defendants, members and the Director of the Bridgeport Civil Service Commission and the Superintendent of the Bridgeport Police Department, were principally charged with administering entrance and promotion examinations which discriminated against Black and Spanish speaking persons on the basis of race, color and/or national origin. Declaratory and injunctive relief was sought under the Civil Rights Acts, 42 U.S.C. §§ 1981, 1983[1] and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.

On January 29, 1973, Hon. Jon O. Newman filed a Memorandum of Decision, reported at 354 F. Supp. 778,

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[1] This action was filed before the 1972 amendment to Title VII of the Civil Rights Act of 1964, Pub. L. No. 92-261, § 2(1)-(2), 86 Stat. 103 (March 24, 1972), amending 42 U.S.C. § 2000e(a)-(b)(1970), which had the effect of extending coverage of the Act to state and municipal employees.

in which he found that the entrance test was unjustifiably discriminatory in effect, but that the plaintiffs had failed to sustain their burden of proof with respect to the promotion exam. As a remedy, the district court enjoined further use of the entrance examination and imposed hiring and promotion quotas which would have raised the level of minority employment within the Department to about 15%; the hiring quota was designed to introduce 50 Black and Puerto Rican patrolmen onto the force.

On June 28, 1973, we issued an opinion, reported at 482 F.2d 1333, affirming the judgment of the district court except with respect to the promotion quotas. We found that these were not warranted, but remanded to the district court so that it could consider whether other relief was appropriate. Familiarity with our prior opinion is assumed.

On remand, Judge Newman heard the parties informally in open court and in chambers, and on October 3, 1973, filed a Memorandum of Decision formulating and implementing a remedy in conformity with this court's opinion that any modification of promotion procedures should "apply to all candidates for promotion irrespective of race or ethnic background." 482 F.2d at 1341. He refused to impose a modified promotion quota or to enlarge the hiring quota, but the time-in-grade criterion for eligibility for promotion was reduced from 3 years to 1 year and the weighting of seniority, and training, experience and general qualifications in the promotion procedure was decreased from 40% to 10%. Moreover, the court determined that the existing eligibility list for the rank of sergeant should cease to be valid one year after the date on which the 15th minority patrolman is appointed.

The plaintiffs urged below and on this appeal that the hiring quota should be increased to 75 so that the 15% minority level is achieved. We agree with the district court that the affirmance of this part of Judge Newman's initial decree by this court was unqualified and we see no reason to change the views expressed there. Plaintiffs' claim that the absence of immediate minority group representation in supervisory ranks undercuts recruitment because of discouragement is effectively answered by the fact that some 271 applications were received from minority members for the examination held after this court's initial decision. 231 took the exam and 81 were successful. After disqualification for failure to meet announced requirements as well as to pass physical examinations, an eligible list of 35 has emerged.

The defendants have appealed from the determination shortening the life of the sergeant's eligibility list. They urge that it is an abuse of discretion since promotion candidates are normally entitled to have their rankings stand for a two-year period. We do not agree. The court below is familiar with and sensitive to the issues here, which are delicate as well as intricate. There has been, in our view, compliance with the decision of this court, and the fashioning of the remedy here is a particularly appropriate task for the district court. *Coalition for Educ. in Dist. One* v. *Board of Elections,* slip op. 2989, 2996 (2d Cir. April 24, 1974) (*per curiam*).

Plaintiffs further urge that the court below abused its discretion by refusing to grant counsel attorneys' fees as part of costs. The district court found that it had discretion to award attorneys' fees, but declined to exercise it here since the litigation was not compelled by the defendants' "unreasonable, obdurate obstinacy," the test em-

ployed by this court in *Stolberg* v. *Trustees for the State Colleges of Connecticut*, 474 F.2d 485, 490 (1973). While attorneys' fees are permitted in actions brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., by express statutory authorization, 42 U.S.C. § 2000e-5(k), the failure of Congress to provide for such fees in § 1983 cases is, in our view, significant.[2] While we do not rule out the possibility that counsel fees might be appropriate in some § 1983 cases, even absent statutory authority, we see no reason to reverse the determination below denying them. In *Jordan* v. *Fusari*, slip op. 3059, 3066 (2d Cir. April 29, 1974), this court remanded the question of the propriety of legal fees in a § 1983 action to the district court in view of the inadequacy of the record before the district judge in that case. There is no such problem here. The trial judge was fully aware of all of the facets of this case, the contribution made by counsel for plaintiffs, as well as the reasonableness of the resistance to the plaintiffs' claims by the defendants. We do not find any abuse of discretion.

Affirmed.

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[2] We do not overlook the Supreme Court's recent opinion in *Bradley* v. *School Bd.*, 42 U.S.L.W. 4703 (U.S. May 15, 1974), a school desegregation case commenced in 1961 under § 1983. The Court there held that § 718 of Title VII of the Emergency School Aid Act, 20 U.S.C. § 1617, which became effective on July 1, 1972, see Pub. L. 92-318 § 2(c)(1), 86 Stat. 236, had application to pending litigation and provided a basis for a fee award. Section 718, however, expressly authorizes the recovery of attorneys' fees in school desegregation suits brought under § 1983. Here no such statute exists.

Order of the Court of Appeals Denying Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of August, one thousand nine hundred and seventy-four.

Present:

HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
HON. WILLIAM H. MULLIGAN,

Circuit Judges.

73-2595,
74-1014

BRIDGEPORT GUARDIANS, INC., *et al.*,

Plaintiffs-Appellants,
Cross-Appellees,

v.

MEMBERS OF THE BRIDGEPORT CIVIL SERVICE COMMISSION, *et al.*,

Defendants-Appellees,
Cross-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants

Order of the Court of Appeals Denying Rehearing

Upon consideration thereof, it is
Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

/s/ VINCENT A. CARLIN

By VINCENT A. CARLIN,
Chief Deputy Clerk

SUPREME COURT, U. S.
JAN 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 75-543

74-543

BRIDGEPORT GUARDIANS, INC., ET AL

VS.

MEMBERS OF THE BRIDGEPORT CIVIL SERVICE COMMISSION, ET AL

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR MEMBERS OF THE BRIDGEPORT CIVIL SERVICE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 497 F. 2d 1113 and is reprinted in Petitioners' Appendix pp. 14a-18a. The opinion of the District Court is not reported, but is reprinted in 8 EPD ¶ 9508 and is set out in Petitioners' Appendix pp. 1a-13a.

JURISDICTION

The Courts jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

It is mandatory that the Federal Courts must use the theory of a private Attorney General when deciding whether to award attorney fees in a class action Section 1981 and 1983, 42 United States Code case, or may the Federal Courts exercise discretion depending upon the facts of the case?

STATUTORY PROVISIONS INVOLVED

Section 1981, 42 United States Code:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1983, 42 United States Code:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law suit in equity, or other proper proceeding for redress.

STATEMENT

Petitioners commenced action pursuant to 42 U.S.C. 44 1981 and 1983 to challenge the hiring and promotion procedures of the Bridgeport, Connecticut, Police Department. Plaintiffs in addition to being members of the Police Department were also members of the Black and Puerto Rican community. The plaintiffs prevailed concerning the entering level but were reversed as to remedy involving promotions. After two years, the plaintiffs did not win the litigation which they sought, but rather a major portion of their litigation was reversed by the Court of Appeals for the Second Circuit.

The District Court denied the award of attorney fees. The Court was well within its discretion in denying costs because the District Court was aware of the role of all of the parties in the attempted settlement of the case. It was only when the settlement discussions broke down neither of the parties were agreeable to a result similar to the final result that the entire litigation continued. In addition, most of the parties who had an interest in becoming members of the force were represented by Ira Horowitz who is with the Bridgeport Legal Services.

ARGUMENT

Petitioners contention that the issue involved is whether Federal Courts have the authority, in the absence of express statutory authorization, to award attorney fees to a successful plaintiff who acts as a private attorney general in enforcing important public policies is not the facts of the present case. Judge Newman did not decide that the plaintiffs' attorneys were acting as private attorney generals. And even if the Judge would have, he still has an option as to awarding attorney fees. The law is clear on this point.

"Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers may award attorneys' fees when the interest of justice so require. Indeed, the power to award such fees "is part of the original authority of the chancellor to do equity in a particular situation," and federal courts do not hesitate to exercise this inherent equitable power whenever "overriding considerations indicate the need for such a recovery."

Thus it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted "in bad faith, vexatiously, wantonly or for oppressive reasons." In this class of cases, the underlying rationale of "fee-shifting" is of course punitive, and the essential elements in triggering the award of fees is therefore the existence of "bad faith" on the part of the unsuccessful litigant."

Hall v. Cole, 93 S.Ct. 1943, 1945, 1946.

Although the award of attorney fees is restricted to exceptional cases another standard for awarding attorney fees is whether bringing the suit was unnecessary and was compelled by the defendants "unreasonable, obdurate, obstinancy". This does not mean that if a defendant decides to resist a claim of discrimination in every case, that he is unreasonable or obstinate.

Stolberg v. Trustees for State Colleges of Connecticut, 474 F.2nd 485, 490.

Mere fact that a defendant is unsuccessful will not justify an award of attorney fees.

Diamond Shamrock Corp. v. Lumbermen's Mutual Gas Co., 406, F.2nd 722.

If awards of attorney fees are to be made to promote public policy expressed in legislative action, they should be authorized by Congress and not by the Court. Counsel fees are not ordinarily recoverable in absence of statutory or contractual authority and only in exceptional cases. Even in cases whereby statute attorney fees are permitted in special circumstances the courts have the discretion of not making any award.

Northcross v. Board of Ed. of Memphis City Schools, 93 S.Ct. 2202.

Congress has not seen fit to pass any legislation making an award of attorney fees permissible in any case brought under 42 U.S.C.A. 1983 and, therefore, the court could only award attorney fees in a very exceptional case in the discretion of the court.

Some courts in their discretion in awarding attorney fees have adopted what is referred to as "private attorney general theory". The rationale for making these awards is that its effect will be to encourage litigants to vindicate public rights without concern for the considerable financial burden of legal fees. In this case, the court merely stated that awarding attorney fees was not mandatory in every case brought under the concept of private attorney general. The award of attorney fees is always discretionary. To be otherwise, might be dangerous. The chief rationale behind the traditional American rule that bars the award of fees to successful litigants, is the fear that parties might be unjustly discouraged from instituting or defending actions to vindicate their rights if the penalty for losing in court would always include fees for the opponents' counsel.

Wilderness Society v. Morton, 42 L.W. 2526.

The private attorney general theory is not rejected by our Circuit. The Guardians' decision stands for the proposition that: "While the concept of private attorney generals is an important one, engulfing it on Sec. 1983 so as to make attorneys' fees "ordinarily" recoverable, **Newman v. Piggie Park Enterprises, Inc.**, supra 390 U.S. 402, would amount to a judicial amendment of Sec. 1983 with a provision Congress has thus far not placed there."

> See Memorandum of Decision of District Court, pet. 10a-11a.

Kirkland v. New York State Dept. of Correctional Service, 374 F. Supp. 1361, 1381-82 (1974) a Second Circuit case applied the private attorney general theory in awarding attorney fees in a similar suit but significantly a subsequent case and one in which the plaintiffs were totally successful. It is also significant to note that the petitioners' attorney, Jack Greenberg, handled the Kirkland case and should be aware that the Second Circuit applied the private attorney general theory when it so sees fit. Judge Newman decided that under the circumstances of the Bridgeport Guardian case, it would be unjust to award attorney fees or apply the private attorney general theory.

> See Memorandum of Decision of District Court, pet. 10a-12a.

The District Court was well within its discretion in denying costs because the District Court was aware of the role of the parties in the attempted settlement of the case. It was only when the settlement discussions broke down that neither of the parties were agreeable to a

result similar to the final result that the entire litigation continued. "The trial judge was fully aware of all of the facets of this case, the contribution made by counsel for plaintiffs, as well as the reasonableness of the resistance to the plaintiffs' claim by the defendants. We do not find any abuse of discretion."

> Opinion of the Court of Appeals, pet. 18a.

> "The award of attorneys' fees to a prevailing party in these situations is an exercise of the general equity jurisdiction of the federal courts."

> **Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co.**, 62 F.R.D. 353, 354 (1974)

The plaintiffs did not win the litigation which they sought, but rather a major portion of their litigation was reversed by the Court of Appeals for the Second Circuit. "Since there is no statutory provision for attorneys' fees under 42 U.S.C. Sec. 1983, attorneys' fees should be allowed only when the public policy would require it."

> **Knight v. Auciello**, 453 F. 2d 582, First Circuit (1972), cited in **Northcross v. Board of Education**, 412, U.S. 427, 93 S.Ct. 2201, 37 L. Ed 2d 43, 51 n.2 (1973).

The court should consider the degree to which a public right is asserted by plaintiff and the extent to which defendant has engaged in deliberate wrongdoing.

> Id; **Lee v. Southern Home Sites Corp.**, 444 F.2d 143 5th Circuit (1971).

In this case, defendants have not deliberately embarked on a course of discrimination and at least with respect to racial discrimination have, in fact, prevailed in their defense against one of the plaintiffs claims. In the exercise of its discretion, the Court declines to award attorneys' fees to plaintiffs.

Smith v. City of East Cleveland, 363 F. Supp. 1131 (1973).

The award of attorneys' fees is discretionary, not mandatory.

> "The allowance of such fees is within the discretion of the district court and its exercise of this discretion would not be upset on appeal in the absence of clear abuse."

Jinks v. Mays, 464 F2d 1223, 1228 (1972).

There is no real conflict between Circuits as to principle on the issue of attorney fees only as to decisions. Therefore, if the jurisdiction of the Supreme Court were granted to review this case by Writ of Certiorari, the Court would be giving the defeated party in the Circuit Court of Appeals another hearing.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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Bridgeport Civil Service Commission

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REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners Bridgeport Guardians, Inc., et al. submit this reply memorandum in support of their Petition for Writ of Certiorari.

Respondents suggest that the Second Circuit has accepted and applied the private attorney general rule, citing *Kirkland* v. *New York State Department of Correctional Services*, 374 F. Supp. 1361 (S.D.N.Y. 1974). *Kirkland*, however, is not a decision of the Second Circuit Court of Appeals, but of a district court in the Southern District of New York. The district court decision in *Kirkland* was handed down on April 1, 1974, prior to the Second Circuit decision in the instant case, and the award of counsel fees in *Kirkland* has since been appealed on the ground that *Bridgeport Guardians* precludes any such award.[1] Subsequent to the Second Circuit decision in the

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[1] *Kirkland* v. *New York State Department of Correctional Services*, No. 74-2116, Brief for Defendants-Appellants, pp. 154-156.

instant case, other defendants in that Circuit have uniformly argued that that decision precludes an award of counsel fees under the private attorney general rule. New York City has maintained in several actions that

> [i]n *Bridgeport Guardians* . . . the Second Circuit Court of Appeals reaffirmed the principles set forth in its earlier decision in *Stolberg* [v. *Trustees for the State Colleges of Connecticut*, 474 F.2d 485 (2d Cir. 1973)]. It is clear that the Second Circuit has explicitly rejected the "private attorney general theory" and the other "theories" relied on so heavily by plaintiffs in support of their demand for attorney fees.... The District Court opinion in *Kirkland* v. *Department of Correctional Services*, 7 EPD ¶ 9268 (S.D.N.Y. 1974) relied on so heavily by plaintiffs, has been implicitly overruled by the Court of Appeals in *Bridgeport*.[2]

It is the very essence of the private attorney general rule that counsel fees not be limited to cases where the defendant was guilty of unreasonable, obdurate obstinacy. See e.g. *Brandenburger* v. *Thompson*, 494 F.2d 888 (9th Cir. 1974); *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971). In the instant case the District Court expressly stated its belief that the standard for awarding counsel fees was whether the defendants had been obdurately obstinate, and denied fees solely on the grounds that they had not. Petition, pp. 11a-12a. The litigation below turned on a narrow question of law. The defendants argued that counsel fees could not be awarded un-

[2] Memorandum In Opposition To Plaintiffs' Motion for Counsel Fees and Costs, pp. 3-5, *Chance* v. *Board of Examiners*, 70 Civ. 4141 (S.D.N.Y.); see also Defendants' Memorandum of Law In Opposition to Plaintiffs' Request for Attorneys' Fees in *ASPIRA* v. *Board of Education of The City of New York*, 72 Civ. 4002 (S.D.N.Y.).

less there was obdurate obstinacy, and the plaintiffs expressly disavowed any claim that there had been such obstinacy. The plaintiffs argued that the lower courts should adopt the private attorney general rule which would mandate an award of counsel fees where, as here, both courts had held that the litigation had vindicated important public policies. Both the District Court and the Court of Appeals denied counsel fees on the ground that there was no obdurate obstinacy. Under the circumstances respondents' suggestion that both courts secretly adopted the private attorney general rule is incomprehensible.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners Bridgeport Guardians, Inc. et al., submit this supplemental memorandum with regard to this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, No. 73-1977 (May 12, 1975).

This case presents the question, discussed but not decided in *Alyeska*, of whether the federal courts have the power, under the "common benefit" rule, to award counsel fees where a successful plaintiff has conferred a substantial benefit on the public and where, by imposing that award on a governmental entity, the cost is passed on to the public. In *Alyeska* the court of appeals disclaimed reliance on the common benefit theory, since an award against the defendant Alyeska Pipeline Service would not have been borne by the benefiting public. 495 F.2d 1026, 1029; slip opinion, p. 5, n. 14; p. 19. Although *Alyeska* did not fall within the ambit of the common benefit rule, this Court reaffirmed the vitality of that rule as expounded

from *Trustees* v. *Greenough*, 105 U.S. 527 (1881) to *Hall* v. *Cole*, 412 U.S. 1 (1973), and declined to limit the rule to benefits under "important" statutes. Slip opinion, pp. 17-18, 24-25, n. 39.

In the instant case, both courts below expressly acknowledged the "substantial public service" which plaintiffs had performed for the citizens of Bridgeport by ending racial discrimination in the hiring of police officers, a finding not questioned by respondents. Petition 17-18. The importance to the community of effective law enforcement is beyond dispute; the lower courts correctly concluded the integration of the Police Department had substantially increased its ability to protect the public. An award of counsel fees against the defendant city agencies, to be met in turn from taxes paid by city residents, would spread the cost equitably among the beneficiaries of that more effective law enforcement. The decisions of this Court require an award of counsel fees where the benefited class is composed of bond holders, *Trustees* v. *Greenough*, 105 U.S. 527 (1883), stockholders, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), creditors, *Central Railroad and Banking Co.* v. *Petus*, 113 U.S. 116 (1885), trust beneficiaries, *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), and union members, *Hall* v. *Cole*, 412 U.S. 1 (1973). Certiorari should be granted to decide whether, and under what circumstances, that common benefit rationale is applicable to cases conferring benefits on the public.

This case also presents a significant question regarding the applicability of new statutes to pending cases. This is an action alleging racial discrimination in public employment, a practice now forbidden by Title VII, which expressly authorizes awards of counsel fees. 42 U.S.C. § 2000e-5(k). This case, however, was filed in February, 1972, one month *before* Title VII was amended to apply

to public employment; the action was therefore commenced under 42 U.S.C. §§ 1981 and 1983. Because Title VII did not then apply to them, plaintiffs could not meet the technical prerequisite to a Title VII action—the filing of a complaint with the Equal Employment Opportunity Commission. The principles reaffirmed in *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268 (1969) and *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696 (1974), require that the counsel fee provisions of Title VII be applied to public employment cases pending on March 24, 1972, when Title VII was made applicable to such discrimination. It would clearly be unjust to penalize plaintiffs for promptly pursuing ripe claims or for failing to file a complaint with EEOC when it was, as a matter of law, impossible to do so.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit.

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